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89-252
No. _____

In The

# Supreme Court of the United States

October Term, 1989

BARRY WARREN CLYDE,

*Petitioner,*

vs.

STATE OF NEVADA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE NEVADA SUPREME COURT

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## QUESTIONS PRESENTED FOR REVIEW

A. IS NEVADA REVISED STATUTE 453.3405(2) VOID FOR VAGUENESS BECAUSE IT ENCOURAGES ARBITRARY AND DISCRIMINATORY ENFORCEMENT?

B. WAS PETITIONER IMPROPERLY PENALIZED FOR EXERCISING HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION AND HIS SIXTH AMENDMENT RIGHT TO TRIAL?

C. DOES A NEVADA REVISED STATUTE 453.3405(2) VIOLATE THE SEPARATION OF POWERS DOCTRINE?

D. DID THE TRIAL COURT COMMIT ERROR BY NOT GRANTING PETITIONER'S MOTION TO EXCUSE A JUROR WHO HAD FORMED AN OPINION AS TO PETITIONER'S GUILT BEFORE THE STATE RESTED ITS CASE?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iii

OPINION BELOW ..... 1

JURISDICTION ..... 2

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED ..... 2

A. THE FIFTH AMENDMENT ..... 2

B. THE SIXTH AMENDMENT ..... 2

C. THE FOURTEENTH AMENDMENT, SEC. 1 .. 3

D. NEVADA REVISED STATUTE 453.3405 ..... 3

STATEMENT OF THE CASE ..... 4

ARGUMENT ..... 11

CONCLUSION ..... 19

APPENDIX ..... App. 1

# TABLE OF AUTHORITIES

Page

CASES

*Grayned v. City of Rockford*, 408 U.S. 104 (1972) ..... 13

*Lefkowitz v. Cunningham*, 431 U.S. 801 (1977) ..... 16

*Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) ..... 13

*Reynolds v. United States*, 98 U.S. (8 Otto) 145 (1879) ..... 18

*Simmons v. United States*, 390 U.S. 377 (1968) ..... 16

*Smith v. Goguen*, 415 U.S. 566 (1973) ..... 13

*Spevack v. Klein*, 385 U.S. 511 (1967) ..... 16

*United States v. Jackson*, 390 U.S. 570 (1968) ..... 15

*United States v. Thompson*, 744 F.2d 1065 (4th Cir. 1984) ..... 18

*Wade v. Hunter*, 336 U.S. 684 (1948) ..... 18

CONSTITUTIONAL PROVISIONS:

Fifth Amendment to U.S. Constitution .2, 14, 15, 16, 17

Sixth Amendment to U.S. Constitution .2, 14, 15, 17, 18

Fourteenth Amendment to U.S. Constitution .....3, 14

STATUTORY PROVISIONS:

28 U.S.C. §1257(3) ..... 2

Nevada Revised Statute 453.3405(2) ..... *passim*

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## PETITION FOR WRIT OF CERTIORARI TO THE NEVADA SUPREME COURT

The petitioner, Barry Warren Clyde, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Nevada Supreme Court, entered in the above-entitled procceeding on June 22, 1989.

## OPINION BELOW

The Nevada Supreme Court dismissed Mr. Clyde's appeal by way of unpublished order filed June 22, 1989, in Case No. 18659. The opinion is not reproduced in any official or unofficial reports. It should be noted, however,

that the Court ruled on the merits of Mr. Clyde's contentions.

## JURISDICTION

The Nevada Supreme Court entered its Order dismissing Mr. Clyde's appeal on June 22, 1989. A rehearing in front of the Nevada Supreme Court was not requested by either party due to the summary nature of the opinion. Jurisdiction is conferred upon this Court by virtue of 28 U.S.C. §1257(3).

## CONSTITUTIONAL PROVISIONS AND STATUTES

### THE FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### THE SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury

of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

## THE FOURTEENTH AMENDMENT

Section 1. *Citizens of the United States*

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## NEVADA REVISED STATUTE 453.3405

1. Except as provided in subsection 2, the adjudication of guilt and imposition of sentence of a person found guilty of trafficking in a controlled substance in violation of NRS 453.3385, 453.339 or 453.3395 must not be suspended and the person is not eligible for parole until he has actually served the mandatory minimum term of imprisonment prescribed by the section under which he was convicted.

2. The judge, upon an appropriate motion, may reduce or suspend the sentence of any person convicted of violating any of the provisions of NRS 453.3385, 453.339 or 453.3395 if he finds that the convicted person rendered substantial assistance in the identification, arrest or conviction of any of the accomplices, accessories, coconspirators or principals or of any other person involved in trafficking in a controlled substance in violation of NRS 453.3385, 453.339 or 453.3395. The arresting agency must be given an opportunity to be heard before the motion is granted. Upon good cause shown, the motion may be heard in camera.

## STATEMENT OF THE CASE

On November 19, 1986, Barry Warren Clyde was charged with five drug related offenses, including trafficking in cocaine, by the Washoe County Grand Jury. Three other persons were also indicted in the same case.

The facts in the following section pertain to petitioner's first three issues. On November 24, 1986, Mr. Clyde was interviewed by Drug Enforcement Administration Special Agent Ron Davis and Detective Al Sabini of the Washoe County Consolidated Narcotic's Unit to determine if Mr. Clyde would be providing them with cooperation pursuant to NRS 453.3405(2). Mr. Clyde was in custody, and his attorney was present. The interview lasted approximately one-half hour, and it was tape recorded. The transcript in its entirety is reproduced in the Appendix.

From the very outset of the interview, Agent Davis made it clear to Mr. Clyde that if Mr. Clyde decided to

cooperate, he would have to include facts and information " . . . about the instant case – your involvement in this immediate case." (App. 1). Agent Davis warned Mr. Clyde "If you don't want to talk about that I think we are going to have a problem with doing other things . . . ." (App. 1). Mr. Clyde, when speaking for the first time, told the officers that although he did not wish to plead guilty to the charges for which he was under indictment, he would like to cooperate with them as to other matters. (App. 4). Agent Davis responded by telling Mr. Clyde that it would not be compatible " . . . to cooperate on [the] one hand and yet go forward on a defense regarding the case that's against him on the other." (App. 5) Agent Davis indicated that he was leery of beginning an undercover operation with Mr. Clyde, only to have Mr. Clyde withdraw his cooperation because he was going to trial in his pending case. Agent Davis said "See I don't want to start something that can't be finished." (App. 5).

Mr. Clyde then reassured Agent Davis that he would cooperate "all the way" on any undercover operation initiated by the officers which did not involve his case. (App. 5). Agent Davis answered Mr. Clyde that he didn't think that would be possible if Mr. Clyde was "going to proceed with [his] case, with the current case . . . ." (App. 6). Agent Davis concluded "see you just can't do them simultaneously." (App. 6). Speaking to Mr. Clyde's attorney, Agent Davis then said "Because how could you possibly have your client on [sic] one hand talk to us and on the other hand, you know well we're going to be adversaries in court. I just don't see how that can be done." (App. 6). Agent Davis then said to Mr. Clyde that he needed to "make a determination" on whether or not

to "take a shot" at trial or to cooperate. (App. 6). Agent Davis ominously added that if Mr. Clyde made the State "go through all the hoops, all the motions" only to decide to cooperate later in an attempt to "recoup [his] losses by cooperation," it would be "too late." (App. 6).

Mr. Clyde tried again to impress upon the officers that he wanted to cooperate "right now on – on you doing your job in your investigations into major league drug deals." (App. 6). Agent Davis responded by asking Mr. Clyde, "Are you willing to talk about the two kilos?" (Two kilos of cocaine were involved in Mr. Clyde's case). (App. 7). Mr. Clyde answered by saying that he had not yet had a chance to review the evidence against him, or to consult with his attorney regarding that evidence. (App. 7). Agent Davis replied:

> I understand what you're saying. It's got to be all or nothing. Cause you know why; I mean I can understand the fact that on one hand you feel that maybe in your mind you may have a defensible case and those are your God given rights and constitutional rights you know to have those feelings to do that. You can't have the best of both worlds and that's what you're asking for here . . . .

(App. 7).

Mr. Clyde responded by offering to help the officers in their efforts " . . . to get some big people off the streets . . . ." (App. 8). Agent Davis suggested that Mr. Clyde spend sometime reviewing his case. (App. 8). Half way into the thought, however, Agent Davis acknowledged that there was no "open file" policy in effect in Mr. Clyde's case, and that he would not be provided with discovery "till almost time of the trial." (App. 8). Mr.

Clyde then said: " . . . that's exactly what my probiem is with this. How can I be asked to plead guilty to charges that I feel that I am innocent of when I don't even [sic] what you have and it is not possible for me to have this discovery procedure prior to my making a plea?" (App. 9). Agent Davis then concluded that the conversation had become "pointless" and "totally academic from here on out." (App. 9).

It was at this point in the interview that Agent Davis reiterated the value of early cooperation:

> Okay, and that's what the judge is going to say. See what he is going to look at at [sic] the time, should you be found guilty, when you come to him for sentencing, he's going to look at from the moment that you were willing to cooperate, that you should have been on the road to rehabilitation at that time. It's like the game is over, you know, I'm willing to get this thing behind me and I'm willing to whatever. That's standing up and admitting to yourself that you've done something wrong. I don't think that you are willing to do this. It's not worth it.

(App. 9-10). When Mr. Clyde responded by saying that the officers were turning down his cooperation, Detective Sabini said that they were not turning it down, but that they "[j]ust [hadn't] heard you offer any real cooperation." (App. 10). Mr. Clyde then asked what he could do for them. Agent Davis answered, "Okay, let's talk about the two kilos." (App. 10). Agent Davis continued "You know, the white double [sic] powder poison a lot of citizens here in this community. That's what I am interested in. Do you want to talk about that?" (App. 10). Mr. Clyde declined, explaining " . . . I want to cooperate with you but I don't think, I think I am going to be aquitted

[sic] on these charges and for me to give up that right which, the right to a trial, which if I plead guilty I'm giving my right to that, to show all evidence." (App. 10).

Agent Davis then refused to accept Mr. Clyde's proffer of names of persons whom the officers could begin to investigate, saying:

> It's not under the right conditions and we're not going to go through this thing half way and all of a sudden you pull back and say we're not going to cooperate any more and than [sic] at a later time you take it an [sic] shove it down our throats by telling the judge that when your attorney makes a filing, or before the judge for sentencing, that hey you attempted to cooperate; it doesn't work that way.

(App. 11). Mr. Clyde assured the officers that it would be foolish for him to stop cooperating once he had started because "[a]ll that would do would endanger my position with the judge who was the final decision" on sentencing if he were to ultimately be convicted. (App. 12).

Agent Davis then tried to entice Mr. Clyde into confessing by telling him that he had never seen a judge not follow his recommendation at sentencing where there had been cooperation. Detective Sabini agreed with Agent Davis, saying "Never seen it happen." (App. 13).

In spite of Mr. Clyde's continued offers to cooperate, Agent Davis repeatedly insisted that he would have to admit guilt and plead guilty before his cooperation would be accepted:

> If you want to maintain your constitutional principles as far as having a jury and going through the nine yards, have at it; that's your right. And I don't have a problem with that. I

> have a problem with doing both at the same time because it is totally a non-working situation.

(App. 13).

> The problem of mine is, you still have not admitted your ways. You're still trying to convince me that you're innocent of the charges. You and I can't work together when it's that way. Maybe some of these other guys might want to, but I'm not, cause I know better. I've got sixteen years of doing what I'm doing. And you can't bullshit the bullshitter.

(App. 14-15).

The name of the game is give up or go up. Give up the information, if not, go do your time. (App. 16). Having been rebuffed in his efforts to cooperate without having to plead guilty on his own case, Mr. Clyde ended the interview.

The facts in this section are presented to the Court in connection with Mr. Clyde's fourth question for review. At the beginning of the trial, the judge instructed the jury to keep an open mind and to refrain from forming or expressing any opinions concerning the case until all of the evidence was in. (App. 23). Midway through the second day at trial, the judge interviewed juror Caldwell outside the presence of the other jurors (App. 29). The interview was triggered by Caldwell telling the bailiff during a break that she was having "difficulty keeping an open mind," and that she was experiencing "some animosity about [defense counsel's] objections and interruptions." (App. 29). Caldwell confirmed these facts to the judge. (App. 31).

When questioned by defense counsel, Caldwell said that notwithstanding her comments she had an open mind as to the outcome of the trial. (App. 33). Moments later, however, she conceded that her thoughts were being "infiltrated with ideas that shouldn't be there," and that she was afraid that she was becoming "tainted." (App. 34-35). Caldwell then admitted to the court that "I definitely have – I have an opinion, and I know that I'm not at this point supposed to have an opinion." (App. 36).

After Caldwell had been interviewed, the judge concluded that "an opinion had been formed." (App. 36). The bailiff was then asked to relate to the court what Caldwell had told him. He testified as follows:

> She pulled me aside outside in the hallway and said that the constant objections were causing here to feel an animosity towards [defense counsel], and she felt that [defense counsel] – it's kind of hard to understand – she said it was like a fish flopping on a deck beating a dead horse.

(App. 38). Defense counsel requested the judge to inquire of the other jurors as to whether Caldwell had made any statements to them regarding her opinion. The court denied this request. (App. 25). Defense counsel then challenged Caldwell for cause. (App. 26). The court allowed Caldwell, notwithstanding her opinion, to remain on the jury. (App. 28).

Mr. Clyde was ultimately convicted after a jury trial of one count of conspiracy to sell a controlled substance and two counts of trafficking in a controlled substance. He was sentenced to ten years in prison. He received the

benefit of substantial assistance under NRS 453.3405(2) over the prosecutor's strenuous objection.

The constitutional challenges to NRS 453.3405(2) were raised prior to Mr. Clyde's trial by way of Writ of Habeas Corpus filed with the trial court and by way of Petition for Writ of Prohibition filed with the Nevada Supreme Court. Mr. Clyde also challenged the constitutionality of the statute on the first day of his trial (App. 23). All pretrial challenges to the statute were denied.

The statute's constitutionality was challenged after trial on direct appeal to the Nevada Supreme Court. The trial court's failure to excuse juror Caldwell for cause was raised in the appeal. Mr. Clyde's Opening Brief was filed on June 24, 1988. In its unpublished opinion filed June 22, 1989, denying Mr. Clyde's constitutional challenges to the statute, the Nevada Supreme Court summarily concluded " . . . under the standards set forth in *Sheriff v. Lugman* [citation omitted], NRS 453.3405(2) is neither void due to vagueness nor constitutionally infirm under a due process or equal protection analysis." (App. 1). The Nevada Supreme Court also denied Mr. Clyde's claim relating to juror Caldwell, stating " . . . the juror's responses to the trial court clearly demonstrated her understanding that she was required to base her determination of guilt, *vel non*, solely on the evidence presented at trial." (App. 1).

## ARGUMENT

Statutes encompassing substantial assistance clauses are rapidly being enacted by states across the country. It is submitted that guidance from this Court as to how

these statutes are to be applied is needed to prevent the kind of abuses that occurred in the instant case. Accordingly, the Court is requested to grant this Petition in order to redress the Constitutional violations which have occurred in Mr. Clyde's case, and to prevent NRS 453.3405, and statutes similar to it, from being used by law enforcement to violate defendants' fundamental rights.

**The Statute Is Void For Vagueness**

The statute involved in this case is NRS 453.3405. Subsection 2 of the statute provides that the judge upon motion, may reduce or suspend the sentence of any person convicted of trafficking in a controlled substance if he finds that ". . . the convicted person rendered substantial assistance in the identification, arrest or conviction of any of the accomplices, accessories, conspirators or principals or of any other person involved in trafficking in a controlled substance . . . ."

When enacted in 1983, NRS 453.3405(2) did not contain the words "or any other persons involved in trafficking in a controlled substance . . . ." This language was added by amendment in 1985. The legislative history of Subsection 2 reveals that the amendment was designed ". . . to afford the defendant the opportunity to help himself by providing information on other drug traffickers of which he had knowledge." It was also designed to " . . . provide relief [from] the minimum mandatory sentence and [to add] the incentive to cooperate. . . ." (App. 22).

A statute is void for vagueness as a matter of due process if it encourages arbitrary and discriminatory enforcement. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). In *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (footnote omitted) this Court set forth the standard to be used in evaluating vagueness on this ground:

> . . . if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standard for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

In *Smith v. Goguen*, 415 U.S. 566, 574 (1973), this Court noted that the more important aspect of the vagueness doctrine " . . . is not actual notice, but the other principal element of the doctrine -- the requirement that a legislature establish minimal guidelines to govern law enforcement."

NRS 453.3405 is impermissibly vague because it contains no explicit standards for controlling its application by law enforcement. The manner in which the arresting officers decide on who they will allow to cooperate is replete with opportunities for abuse. While there may be situations in which law enforcement may summarily deny a defendant the right to cooperate under NRS 453.3405(2) (for example, if a defendant's information did not concern trafficking in a controlled substance as the statute requires), law enforcement must not be allowed, as it did in this case, to condition the acceptance of a defendant's offer of cooperation, as to persons not

involved in his case, on the making of an involuntary confession and the relinquishment of the right to trial.

The purpose of Subsection 2 was to allow a defendant facing a sentence of up to life in prison the opportunity to mitigate the severity of his potential punishment, and to provide law enforcement with an incentive to offer a defendant to inform on persons not involved in his case. (App. 22). Subsection 2 of the statute was not meant to be a bludgeon to force defendants to confess and to plead guilty against their wills. But as the taped interview shows, this is exactly how Agent Davis and Detective Sabini tried to use it. Every time Mr. Clyde attempted to cooperate, Agent Davis demanded that Mr. Clyde confess and plead guilty to the charges he was indicted on. When Mr. Clyde refused to confess, Agent Davis rejected all of Mr. Clyde's attempts at cooperation with regard to matters not involving his case.

Mr. Clyde's case proves that NRS 353.3401(2), by its silence on the scope of the power it confers to law enforcement, permits the arbitrary and discriminatory application of the substantial assistance provision by law enforcement to impermissibly coerce defendants into waiving their fundamental rights. Accordingly, it is void for vagueness in violation of the Due Process Clause of the Fifth Amendment as it is made applicable to the states by the Fourteenth Amendment.

**The Exercise Of The Petitioner's Fifth And Sixth Amendment Rights Was Burdened**

Mr. Clyde was deprived of due process of law in that he was improperly penalized for exercising his right

under the Sixth Amendment to go to trial. The officers' refusal to allow Mr. Clyde to cooperate prevented Mr. Clyde from obtaining the full benefit which Subsection 2 was capable of conferring upon him at sentencing. Mr. Clyde's co-defendant, Robert Cooney McCollister, received probation as a result of his "substantial assitance." Although the trial court also ruled that Mr. Clyde had provided "substantial assistance," he received a ten year sentence. Had Mr. Clyde been allowed to cooperate early on in his case, it is likely that he would have been awarded a probationary sentence. Agent Davis made it very clear during his interview with Mr. Clyde that early cooperation carried great weight with sentencing judges (App. 9), and that sentencing judges had always followed his recommendations in the past. (App. 12-13). Because Mr. Clyde was improperly denied the right to cooperate by law enforcement, he suffered at sentencing.

This Court, has in the past, stuck down laws that chilled or needlessly burdened the exercise of constitutionally protected rights. In *United States v. Jackson*, 390 U.S. 570, (1968), this Court declared unconstitutional a provision of the Federal Kidnapping Act that authorized the death penalty if a jury so recommended it, but contained no procedure for imposing the death penalty upon a defendant who waived his right to a jury trial or pleaded guilty. The Court held that the death penalty provision had the "inevitable effect" of "discourag[ing] assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial." Id. at 581, (footnote omitted). Although the death penalty provision served proper governmental purposes, these objectives " . . . cannot be

pursued by means that needlessly chill the exercise of basic constitutional rights . . . ." *Id.* at 582. The Court rejected the government's argument that judges may be relied upon to reject coerced guilty pleas:

> It is no answer to urge, as does the Government, that federal trial judges may be relied upon to reject coerced pleas of guilty and involuntary waivers of jury trial. For the evil in the federal statute is not that it necessarily coerces guilty pleas and jury waivers but simply that it needlessly encourages them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right.

*Id.* at 583.

This Court has, in a long line of cases, protected the Fifth Amendment privilege against self-incrimination against laws which made its assertion "costly" by the imposition of penalties. *Lefkowitz v. Cunningham,* 431 U.S. 801, 805 (1977); *Spevack v. Klein,* 385 U.S. 511, 514-15 (1967). The Court has also declared that a state may not require the forfeiture of one constitutionally protected right as the price for exercising another. *Simmons v. United States,* 390 U.S. 377, 394 (1968).

NRS 453.3405(2) violates due process in that it needlessly encourages law enforcement to coerce defendants in Mr. Clyde's situation into confession and pleading guilty. The statute, as it stands now, gives law enforcement the apparent authority to demand a full confession and guilty plea as a condition precedent to the acceptance of cooperation profferred as to persons not involved in his case. The statute does not have to allow this in order to accomplish legislature's intent.

The dual purpose behind the 1985 amendment to NRS 453.3405(2) was to (1) allow the defendant to benefit himself, thereby mitigating the harshness of the minimum mandatory sentences of incarceration which can be imposed in connection with a trafficking conviction, and (2) to provide law enforcement with an incentive to offer a defendant the possibility of a reduced sentence for providing information with regard to persons not involved in his case. These purposes can be served just as well by allowing the defendant to proceed to trial on his underlying charges while providing information on other persons. All that would be required to accomplish this is additional language in the statute stating that law enforcement could not demand a confession as a condition for the acceptance of cooperation on other matters, and that nothing a defendant said to the officer in relation to other matters could be used as evidence against him in the state's case-in-chief. The statute could, in this manner, fulfill its purpose while, at the same time, avoiding encouragement to law enforcement to bludgeon a defendant into giving up his Fifth Amendment privilege against self-incrimination and his Sixth Amendment right to trial.

An amendment to the statute would also cure another area in which counsel believes it runs afoul of the Constitution. As it reads now, NRS 453.3405(2) may be applied in such a manner as to violate the separation of powers doctrine because it allows law enforcement to virtually usurp the judge's discretion in granting "substantial assistance." By summarily refusing a defendant's profferred cooperation, law enforcement can effectively

prevent a trial court from making a finding of "substantial assistance."

**Juror Bias**

Under the Sixth Amendment a criminal defendant has the right to a trial by an impartial jury. *Reynolds v. United States*, 98 U.S. (8 Otto) 145, 154 (1879). That right is compromised when the trier of fact is unable to render a disinterested, objective judgment. When a question is raised before the jury retires about whether a juror can fulfill his duties with an open mind, the district court must determine that the juror is competent to proceed before continuing with the trial. *United States v. Thompson*, 744 F.2d 1065, 1068 (4th Cir. 1984).

Where a trial judge has discovered facts during a trial which indicate that one or more members of the jury might be biased against the government or the defendant, "[i]t is settled that the duty of the judge in this event is to discharge the jury. *Wade v. Hunter*, 336 U.S. 684, 689 (1948).

In the instant case, not only did juror Caldwell admit, after all was said and done, that she had very definitely formed an opinion as to Mr. Clyde's guilt (that Mr. Clyde's case was like a fish flopping on a deck beating a dead horse), the court agreed with her. (App. 38). Under these circumstances the court was duty bound to empanel the alternate juror or to declare a mistrial and start the trial anew. It was also error for the court not to make inquiry of the other jurors as to whether there had been contact between them and Caldwell which could have prejudiced them against Mr. Clyde.

## CONCLUSION

It is respectfully submitted that, for the reasons outlined above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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# INDEX TO APPENDIX

Page

Unpublished order of the Nevada Supreme Court, dated June 22, 1989 .....App. 1

Interview of Mr. Clyde by Drug Enforcement Administration Special Agent Ron Davis and Washoe County Consolidated Narcotics Unit Detective Al Sabini on November 24, 1986...App. 3

Legislative History of NRS 453.3405(2).....App. 22

Excerpt of Trial Transcripts, Vol. II, May 19, 1987.....App. 23

Excerpt of Trial Transcripts Vol. II, May 20, 1987.....App. 25

May 21, 1987.....App. 28

Excerpt of Trial Transcripts, Vol. III, May 20, 1987.....App. 29

IN THE
SUPREME COURT OF THE STATE OF NEVADA

| | | |
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| BARRY CLYDE, Appellant, | ) | |
| vs. | ) | No. 18659 |
| THE STATE OF NEVADA, Respondent. | ) | (Filed June 22, 1989) |

*ORDER DISMISSING APPEAL*

This is an appeal from a judgment of conviction pursuant to a jury verdict finding appellant guilty of one count of conspiracy to sell a controlled substance and two counts of trafficking in a controlled substance, and from the district court's denial of a motion for a new trial.

Having reviewed the record and the briefs, and having heard the parties' arguments, we conclude that Clyde was properly convicted and sentenced below. First, under the standards set forth in Sheriff v. Lugman, 101 Nev. 149, 697 P.2d 107 (1985), NRS 453.3405(2) is neither void due to vagueness nor constitutionally infirm under a due process or equal protection analysis. Second, the testimony of appellant's co-conspirator did not violate the rule stated in State v. Franklin, 94 Nev. 220, 577 P.2d 860 (1978). Third, the juror's responses to the trial court clearly demonstrated her understanding that she was required to base her determination of guilt, *vel non*, solely on the evidence presented at trial.

We have carefully considered appellant's remaining assignments of error and conclude that they too are without merit. Accordingly, we

ORDER this appeal dismissed.

/s/ Young, C.J.
Young

/s/ Steffen, J.
Steffen

/s/ Springer, J.
Springer

/s/ Mowbray, J.
Mowbray

/s/ Rose, J.
Rose

cc: Hon. Robin Anne Wright, District Judge
Hon. Brian McKay, Attorney General
Hon. Mills Lane, District Attorney
Larry Guy Sage, Deputy District Attorney
John J. Momot
Judi Bailey, Clerk

(p.1) *INTERVIEW WITH DEFENDANT BARRY CLYDE*

This is Special Agent Ron Davis with Drug Enforcement Administration. Present during this interview is Detective Al Sabini, Washoe County Consolidated Narcotic's Unit. Present also is Barry Clyde who is being represented by Richard Fleischer, attorney representing Clyde Barry, correction, Barry Clyde.

(DAVIS) Today's date is November 24, 1986. Approximate time is 3:30 p.m.

Okay, my understanding is everything right now is just very initial to start with and my understanding as far as your intentions as far as cooperation is, is this going to be something that is going to be partial; some things that you want to give up, other things that you don't want to give up, because you are going to have to know right off from the start that is we're going to talk about cooperation we have to be talking about the instant case – your involvement in this immediate case. If you don't want to talk about that I think we are going to have a problem with doing other things because what that tells me is that you're only willing to give up a part of it, okay, or those people that you want to focus on and leave other things out. And I'll tell you want [sic] the problem with that is, is that somewhere down the road somebody is going to get embarrassed by it and I don't want it to be me. I don't want this to end up with egg on my face in any type of court (p. 2) proceedings where you have intentionally left some things out for whatever reasons. I think that as you know as a defense attorney how that can come back to haunt you. So I don't know if that is going to cause a problem. I talked with Ed Basl who is the D.A. in this

instant case and it was mentioned that there was a possibility that you only wanted to talk about certain things but yet didn't want to talk about other things. And I don't see how we can have a complete honest understanding between each other and try to work with each other if you want to hold back on some things and yet talk about other things. It can't be done that way. So I don't know if that's a problem or not.

(CLYDE) Well, I don't know how to start cause I've never been in a situation like this and I'm going to have to try and choose my words very carefully to give gravity to the situation. I have, because of businesses; my contractors license, real estate business, any plea bargaining and pleading guilty to any kind of a felony is very very serious to me because it jeopardizes, or probably will cost me my licenses and at this point in time I don't want to plead guilty to any felonies. I am a very good, law abiding citizen. I do wish to cooperate with the Government. As you indicated earlier sir about, that you are paid by the Government and you are paid to try (p. 3) and get drugs and drug dealers off the streets and try and do things, and that's what your job is and I understand that; and as a good citizen I wish to cooperate in that with you. And I feel that I have some people that I know of that are I guess, not knowing a lot about this big drug dealing stuff; I do feel I have some people in California that have some things that are going with people in other countries that you would be interested in and I would like to fully cooperate with you in your effort to do something along those lines with those people, including getting actively involved in helping you do your job and that's what I'm here to do.

(DAVIS) Well I understand that. Looking at it from your point of view, how can a person be able to cooperate on one hand and yet go forward on a defense regarding the case that's against him on the other? It's not compatible. Becasue [sic] somewhere down the line should you opt to take this thing to trial then all cooperation to that point ceases for any ongoing investigation which we may invest time, money and other efforts would come to a stop. Do you see my point?

(FLEISCHER) I understand what you are saying and if we decide to go to trial all the way and then if my client changes his mind and at that point in time where he decides not to assist you any longer, is that what you are saying?

(p. 4) (DAVIS) Yea. See I don't want to start something that can't be finished. There is no point in doing that.

(CLYDE) Ron, my intent here is to help you all the way in helping you do your job, which you have stated to me is to try and get drugs and drug dealers off the street and bust big time drug guys. That's what you have indicated your job is and I am here to help you all the way. Regardless of what happens in this case, I am here to help you in your endeavor. And it would not be me, if we get into this thing and you don't like some things that are going on this separate case, that's your prerogative, but I intend to fully cooperate all the way along including, if possible, to maybe help set some kind of deals up that would allow you to do your job and that's what I am here to do.

(DAVIS) Well I don't think that's really possible. I think the reasons for that, hopefully for you, would be obvious in that if you are going to proceed with your case, with the current case, I don't see how it is possible that any kind of cooperation until the outcome or disposition of your case. See you just can't do them simultaneously. I just don't see how that could be a viable or workable situation. Because how could you possibly have your client on one hand talk to us and on the other hand, you know well we're going to be adversaries in court. I just don't see how that can (p. 5) be done. I've seen this in previous situations and it turns out to be a real nightmare situation for both sides. I think what you need to do is make a determination; if you feel if you got a good chance for a shot of beating this case in this Nevada State Court then maybe you ought to take a shot at that. Sometimes the problem down at the end of the road is, is usually when you make us go through all the hoops, we're doing that right now with a couple of other cases based on almost the same scenario, but we start going through all the hoops, all the motions, creating all the work, and then when you come out and you realize that you're coming out on the short end of the deal then you start trying to recoup your losses by cooperation, that's when we say too late.

(CLYDE) Sir, I wish to cooperate with you from right now on on you doing your job in your investigations into major league drug deals. That's what I wish to cooperate with you and I wish to start right now. You are the one that's holding all the cards and I am coming to you and offering my cooperation.

(DAVIS) Are you willing to talk about the two kilos?

(CLYDE) At this point in time, not having the opportunity to review my case with outside counsel, with other informed sources, I really . . . but I am here to cooperate with you in doing your job.

(p. 6) (DAVIS) I understand what you're saying. It's got to be all or nothing. Cause you know why; I mean I can understand the fact that on one hand you feel that maybe in your mind you may have a defensible case and those are your God given rights and constitutional rights you know to have those feelings to do that. You can't have the best of both worlds and that's what you're asking for here, because, first of all I am not going to initiate anything unless I know that the person I am going to be sitting down with, because somewhere along the line I am going to put my trust, perhaps even my life or the life of some of these other people in what you say and in what we do. I'll tell you, my life and these other people's lives are not worth right now what you have to say. Okay, there has to be a credibility that has to be built up. And when you hold back certain things, or not be completely honest on different things, or only giving us what you want to know, somewhere down the line somebody's going to get hurt and it's not worth it.

(SABINI) We have to establish your credibility right? Now we know certain things about this instant case that you're involved in. All right, where else are we going to establish your credibility other than the stuff that we can independently verify?

(CLYDE) I don't know. I don't know now you establish (p. 7) credibility with anybody that you deal with. Most of the people, I would understand, my record is clean as I understand, I have never done anything more than get speeding tickets in my life until this particular night in question. I don't know how you guys operate. My understanding is that you do do deals with people that are of, I would say, far less credibility or have far less credibility than I have. Okay, as I said I don't know how you do your business but I am here to cooperate with you, to help you in your efforts to get some big people off the streets and that's what I want to do.

(DAVIS) Maybe you need to spend some time.., of course, one of the problems working with the District Attorney here is that when it comes to discovery, I understand you don't get discovery of the reports or investigative reports til almost time of the trial. Is that correct?

(FLEISCHER) That's probably right.

(DAVIS) See, unfortunately, unlike the Federal system where they have open file discovery, which is something that I have always agreed with, although initially I was against open file discovery, but I've seen what the benefits are by having open file discovery. What that means is that in Federal Court, at least here in the district of Nevada, in Reno, that shortly after your arraignment your attorney are given copies of all the investigative reports surrounding that case. It is just the opposite (p. 8) here. There is no open file discovery so you have no idea what it is that we have against you, assuming you want those statements made by other people or whatever else of the co-defendants.

(CLYDE) Yes sir, and that's exactly what my problem is with this. How can I be asked to plead guilty to charges that I feel that I am innocent of when I don't even [sic] what you have and it is not possible for me to have this discovery procedure prior to my making a plea?

(DAVIS) First of all Barry you know its, everybody, including yourself, knows what's right and wrong. You know what you did and you know what you didn't do. So you are going to try and sit here and tell me that you weren't involved. I'm not asking you to make an admission, I am just asking you to think about what I am going to say to you. If you're going to sit here and try and tell me that you were not involved in bringing those two kilograms up here, I think this conversation is totally academic from here on out. It's pointless. Because if you and I are going to have some kind of rapport of trying to do something, we need honesty and trust. Okay, again, I am not asking you to make any admissions okay, but what I'm saying is I'm already getting a real negative feeling about this whole thing.

(CLYDE) Well, I'm sorry for that.

(DAVIS) And that's a risk that I'm not willing to take. (p. 9) Okay, and that's what the judge is going to say. See what he is going to look at at the time, should you be found guilty, when you come to him for sentencing, he's going to look at from the first moment that you were willing to cooperate, that you should have been on the road to rehabilitation at that time. It's like the game is over, you know, I'm willing to get this thing behind me and I'm willing to whatever. That's standing up and admitting to yourself that you've done something wrong.

I don't think that you are willing to do that yet. Therefore, I'm not ready to do this. It's not worth it.

(CLYDE) So in other words, sir, you are turning down my cooperation in doing your job which is fighting for the taxpayers and the Government to get drugs and drug dealers off the street?

(SABINI) Well, actually Barry, we're not turning down your cooperation, we just haven't heard you offer any real cooperation.

(CLYDE) I'm ready to talk about cooperation; what I can do for you.

(DAVIS) Okay, lets talk about the two kilos.

(CLYDE) What I want to talk about is you . . .

(DAVIS) Two kilos came to this community from the bay area. Two kilograms of cocaine, okay. You know, the white double [sic] powder poison a lot of citizens here in this (p. 10) community. That's what I am interested in. Do you want to talk about that?

(CLYDE) I am very reticent to the way you're directing the question. I'm reticent to get into this, in that I go back to the same situation where I don't think; I want to cooperate with you but I don't think, I think I am going to be aquitted [sic] on these charges and for me to give up that right which, the right to a trial, which if I plead guilty I'm giving my right to that, to show all evidence. And I want to show. . . .

(DAVIS) Then way [sic] even cooperate period?

(CYLDE) Because I'm a good, law abiding citizen and I wish to help you out.

(SABINI) If you think you might get acquitted, but you want to have some cooperation on the record just in case you don't. And that's exactly the bottom line here, now don't and snow me, okay?

(DAVIS) I'll tell you what you do. Go ahead and take your shot in court on this case, if you [sic] acquitted, and you truly mean what you're saying about helping, then you'll come in and do the right thing.

(CLYDE) I want to do it right now. I want to help you right now.

(DAVIS) Now is not the right time.

(CLYDE) I have names.

(DAVIS) I'm sure you probably do. It's not the right time. (p. 11) It's not under the right conditions and we're not going to go through this thing half way and all of a sudden you pull back and say we're not going to cooperate any more and than at a later time you take it an [sic] shove it down ~~ou~~r throats by telling the judge that when your attorney makes a filing, or before the judge for sentencing, that hey you attempted to cooperate; it doesn't work that way.

(CLYDE) Sir, as I understand the procedure, you have the cards all the way and the judge has the final say so. I've been in, told, that if I was to plead guilty to one count or something, or to trafficking or some charge, if I plead guilty that (get my thoughts straight) . . . well my main situation here is that I am very willing to cooperate with you but I feel like that there is a good chance that I will be acquitted of this crime, of these charges rather, and that I want to cooperate all the way along. You have

the cards to say, hey you've been working with us and now you're talking about me pulling back my cooperation. Now why would I go in and cooperate half way with you and we get half way into some deal or some scam or something like that with people and I pull back. All that would do would endanger my position with the judge who has the final decision.

(DAVIS) Okay, let me ask you this. Let's say if you are (p. 12) acquitted, are you going to come in and talk to me about the two kilograms that you got from the guy that you got it from, or the people that you got it from?

(CLYDE) Well if you ask me I might. You're asking me right now.

(DAVIS) This is the guy that's talking about he wants to help society and the citizens of our community, right?

(CLYDE) If you come and ask me I might help you out. Here I am right now, I'm here to help you out and it sounds like you don't want the names. I wish you could understand it. You have the cards all the way along, Ron. And the judge has the final decision. My understanding, my attorney has indicated to me that if I cooperate with you and plead guilty to a felony that still we go down to the very end of the sentencing deal and the judge will say, well I don't know. The judge still has the latitude to make any decision he wants. He does not have to abide by any agreements that I make with you. And for me, I have nothing. You have the cards all the way along.

(DAVIS) Know who you have? You have us, Becasue [sic] we are the ones that go before the judge and

sit down, and I have yet to ever see trafficking citation has been instituted to where one of these fellows or myself, have gone before a judge because somebody has cooperated and not to give that person what we have asked to give through the District Attorney's Office. Have you, I'm my [sic] mistaken (p. 13) in that?

(SABINI) Never seen it happen.

(DAVIS) It's not going to change now with you.

(CLYDE) Let's work together then.

(DAVIS) You've got to make a decision in your mind if it's going to be all or none. It's got to be that way. I'm not going to work, sit down and talk with you, until you make a determination which way it is that you want to go. If you want to maintain your constitutional principles as far as having a jury and going through the nine yards, have at it; that's your right. And I don't have a problem with that. I have a problem with doing both at the same time because it is totally a non-working situation. And I am not going to start something that can't be finished. I've got better things to do. I got a dozen other people out here I need to sit down and talk with that are more viable, more workable; their [sic] willing to set down and say, hey, the games over for me, I'm willing to do whatever I can; I am throwing myself in your arms, your hands, and I'll run whatever way you want to do it. You tell me how it and that's the way I'm going to do it. You're not at that point now. I have at least fifteen to twenty people a day give me names; hundreds of names. We have a computer system that's got ten miilion names in it.

(p. 14) (CLYDE) I want to do more than give you names. I'm willing to work with you as a businessman.

(DAVIS) You want both sides of the coin. You want to hold off on this other thing and you want to do the other thing. I [sic] can't be done that way. Maybe you can find somebody else to do it. I'm not going to do it that way.

(CLYDE) It sounds like you don't, cause if you have all the cards, Ron, you're talking about me backing away from cooperation half down in the deal; I have no reason to do that cause that's even going to piss you off even more. You're going to be more upset if I did something like that. So there is no way I'm going to do that. So I want to cooperate with you and start right now and if you want to get into some kind of deal, and as a businessman involved in real estate construction, setting up syndications, partnerships and things like that, it's exciting to me. I have to admit, I told my attorney earlier, that this is kind of like undercover stuff like that, it's kind of exciting to me too. I have to admit there is a certain excitement there. And what I am talking about doing is going, and I am not talking about just giving you names, but I am talking about possible making purchases for you and letting you go up and get big-time drug dealers, you know, five, ten, hundred, five-hundred kilos, whatever. Is that what you want?

(p. 15) (DAVIS) The problem of mine is, you still have not admitted your ways. You're still trying to convince me that you're innocent of the charges. You and I can't work together when it's that way. Maybe some of these other guys might want to, but I'm not, cause I know

better. I've got sixteen years of doing what I'm doing. And you can't bullshit the bullshitter.

(CLYDE) Ron, I don't feel as if I'm bullshitting you. I am coming to you . . .

(DAVIS) I know exactly what you're doing. Barry, how may [sic] hundreds of thousands of people to [sic] you think I've had sitting there and talked to and heard the same rhetoric?

(CLYDE) I don't know because I know nothing about your business.

(DAVIS) Because of my experience in doing it, I tell myself, no more. So I know when someone workable and when someone's not. I stop it before it gets to that. When I was younger and more eager . . . now I just slow down and I just kind of pick my way through it.

(CLYDE) Well, all I can say, Ron, I'm here . . .

(FLEISCHER) We're not getting..I understand, I understand what's going on.

(DAVIS) I think you can see down the road some of the potential problems.

(FLEISCHER) I mean it's up to you guys whether you want to listen to him, you know, take the information or not. If you're not willing to do it then we are not getting anywhere.

(p. 16) (DAVIS) Right now I can see taking the information because there is nothing we can do with it. I mean just because you give me a lot of names . . . I lost my train of thought.

(CLYDE) Me too. But Ron, don't you understand that you are the one that holds the cards. Your [sic] the guy that reports in to the judge. So if I do something anywhere along the line, when we're doing something and I do something that you don't like, you the latitute to screw me basically. And I feel like I have been railroaded into this whole thing. I have been kept in here for a week, not able to talk to anybody other than my attorney here; I'm not able to find out what's going on. Not knowing anything about the drug business or this big-time dealing or the law, or how anything works, I feel like I am at a very very big disadvantage.

(DAVIS) That's the system. That is why you pay exorbitant fees for attorneys. So he can tell you what you are going through. I kind of gave you a basic idea of what was going to happen. I told you right from the outset. The name of the game is give up or go up. Give up the information, if not, go do your time.

(CLYDE) I want to give information to you. I want to start right now if you want to try and set up some.

(DAVIS) I am not interested in just taking names because there is not a whole heck of a lot I can do with them. I get so many, I get lists full of names. There is not (p. 17) a thing I can do with it. Just cause you tell me Joe the raghead down the street is doing dope, don't mean diddiy to me. I can't do a thing with that.

(CLYDE) I understand that. That's why I said I want to cooperate way beyond that, as my understanding is that I have to provide, or you're looking for substantial cooperation, which to me is beyond giving names. I am very happy to get involved in deals.

(DAVIS) How are you going to do that?

(CLYDE) Please don't interrupt me sir.

(DAVIS) How are you going to do that?

(CLYDE) Well, it is my understanding that you set up operations and do things where you make purchases through other people and than [sic] is what, I am very happy to cooperate with you.

(DAVIS) How are you going to do that?

(CLYDE) Just start talking right now and we'll and I am going to tell you what I've got.

(DAVIS) How are you going to be able to get out of jail to do that?

(CLYDE) I don't know, I don't know how the law works. I am trying to get a bail reduced because I have a cruel and unusual bail situation going right here. If I can get out on bail then, or whatever the method you guys use, the reason I want to get out on bail is so that I can examine these things and find out what the case (p. 18) is and find out all the particulars about the law. Here I am going in, not getting a lawyer, not being familiar with all the drug laws and drug situations. I know nothing. Yes, and at the same time, just a corollary; Ron, If you had three teeth that hurt you on the side of your mouth here and you went in and your handy dentist here says, listen, not only are those teeth bad, but you've got this and this and this wrong. What would you do Ron? And if he says, hey I really think that we should probably schedule taking those things out tomorrow morning, would you go and say, fine, you're the boss, I'll go with you; I know nothing about it, but I'll go with you. Well that's the

situation I feel that I have been placed in. And all I want to do is go, and I've told Richard this, I've explained my situation to him, I want to go and get some outside counsel to verify that I have three bad teeth that need to be pulled. Now does that make any sense with you?

(DAVIS) It's your choice. So why you telling me?

(CLYDE) I'm trying to explain . . .

(DAVIS) Hey, the bail's a hundred and fifty thousand. Post the bail, get out, do whatever you got to do.

(CLYDE) I don't have that kind of money. I guess I'll just, I don't know what I'll do.

(DAVIS) What do you expect us to do?

(p. 19) (CLYDE) Well, I thought that maybe your intent on doing what you indicated your job was to try and get drugs off and make big-time busts and stuff like that. That's what your job is and I wish to help you cooperate, not only by giving you names, I am ready to give you some names and some scenarios right now. And you are the guys that cook up these deals. I know nothing about it but I do have entrance into some people that are apparently doing things that you might be interested in. And I think that I can help you Ron. And I am asking you if you want my help; and I am not talking about just giving these names. I am talking about going and meeting these people and doing how these things are put together. I don't know how they are put together but I am asking. I'm going to cooperate with you, and together if we can cook up some scenarios that make any sense to you, then let's do that. And I am talking about possibly that there's people out that are doing five, ten, fifty or a hundred

kilos. If you're interested in that then why don't we cooperate right here. You have the cards all the way along, Ron. If you feel that I am not, that this is not worth your time, to get some guy for a hundred kilos or some major league importer guy and some major league deals; if you feel that, then you have the right to say, hey Barry, you're not doing us any good and we don't want (p. 20) to work with you anymore.

(DAVIS) I understand what you're saying. How are you going to get out to do this? You going to make the bail?

(CLYDE) I don't know if I am or not. I don't know. I am trying to get a bail reduction because I feel that two hundred and fifty thousand dollars cash, that is punitive. You are basically.., this is another reason. Why? This is punitive. You could make it a million dollars cash. It's the same thing.

(DAVIS) Sometimes we do. Sometimes there's no bail.

(CLYDE) You know it's interesting. There's people in there in the jail that have murdered people that have less bail than I do.

(DAVIS) Tell your attorney. You have the right to petition the court and do whatever you can. And once you make the bail and if you want to come back to talk with us and cooperate at that time, that's fine.

(CLYDE) Well, maybe that's what we'll have to do. I do want to cooperate with you, Ron.

(DAVIS) I don't think this is the time though. You can't cooperate when you're holding back certain information and certain things. It doesn't work that way.

(CLYDE) How do you know what I am holding back. You wont't [sic] even give me an opportunity to help you.

(DAVIS) You don't even want to talk about the instant case. There is no point in doing . . .

(p. 21) (CLYDE) The instant case is up in the air. Who knows what the case is.

(DAVIS) Then I would say, resolve that first and once that's been resolved, and if you still have that ambition and those feelings, which I don't think you will anyhow, we'll talk about it.

(CLYDE) To me Ron, we're sitting here and it's like you're not wanting to cooperate with me. You're not wanting to here [sic] what I have even; to see if it's of any use to you.

(SABINI) Now really in an ongoing set of circumstances, okay. Part of those circumstances involve your up an Incline, Lake Tahoe. Now you're asking us to take that out. No ignore that. Now wait a minute, you're asking us to take that out and ignore that and take the information that you have that does not deal with that, okay. How do we know that it does not deal with it. Well it sounds to me like you don't want to talk about anything that has to deal with it.

(CLYDE) May I speak with Mr. Fleischer outside please?

(DAVIS) Sure. I am terminating this tape at this time. It's approximately 3 minutes after 4:00 p.m.

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MINUTES OF THE
SENATE COMMITTEE ON HUMAN RESOURCES & FACILITIES

Sixty-Third Session
February 11, 1985

The Senate Committee on Human Resources & Facilities was called to order by Chairman Joe Neal, at 1:30 p.m., on Monday, February 11, 1985, in Room 213 of the Legislative Building, Carson City, Nevada. *EXHIBIT A* is the Meeting Agenda. *EXHIBIT B* is the Attendance Roster.

PRESENT:

Senator Joe Neal, Chairman
Senator Randolph J. Townsend, Vice Chairman
Senator William J. Raggio
Senator Donald R. Mello
Senator Helen A. Foley
Senator Bob Ryan
Senator Ray Rawson

* * *

The closing of the loophole would allow the seller to be prosecuted under the traffic statute, if he represented the drug to be one ounce or more. Section 2 of the bill, was self explanatory. The intent was to afford the defendant the opportunity to help himself by providing information on other drug traffickers of which he had knowledge. The current language provides relief of the minimum mandatory sentence and the incentive to cooperate, if the defendant gives substantial help in identifying his accomplices or co-conspirators. They felt by changing the language, they would benefit by getting information on more drug traffickers.

* * *

Case No. C86-2003

Department No. 8

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

HONORABLE ROBIN ANNE WRIGHT, DISTRICT JUDGE

| | |
|---|---|
| THE STATE OF NEVADA,<br>Plaintiff,<br>vs.<br>BARRY WARREN CLYDE,<br>Defendant. | TRIAL<br>Volume II |

TRANSCRIPT OF PROCEEDINGS

May 19, 1987

Reno, Nevada

* * *

(p. 31) And, lastly, I'd like to challenge the constitutionality of the trafficking statute. For the record, I receipted the Court with a copy of my writ to have prohibition to the Nevada Supreme Court. I'd like to have that incorporated by reference in these proceedings prior to the trial commencing so that my record is intact.

* * *

(p. 37) Keep an open mind and refrain from forming or expressing any opinions concerning this case until all of the evidence is in, the attorneys have made their closing arguments to you, you have received the Court's

instructions as to the law, and you have retired to the jury room to find a verdict.

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TRANSCRIPT OF PROCEEDINGS

VOLUME II

May 20 & 21, 1987

* * *

(p. 35) THE COURT: Okay. Did you want to do anything about the juror, counsel?

MR. MOMOT: Absolutely, your Honor. I think the Court – May I make a suggestion of the Court inquiring of (p. 36) the other jurors if this one particular juror has spoken to them or made any statements to them and thereby contaminated the remaining panel?

THE COURT: That's what you want me to do? That's what you're asking?

MR. MOMOT: Instead of just asking the one juror, because I – to tell you the truth, I have a real problem with her credibility. When she was being questioned by the Court and by counsel for the State and myself, she gave certain answers; that, in all due respect with an officer of the court working on your staff, she made certain statements to which she did not state to the Court on her own. So I have a distinct problem with her own credibility of being candid.

THE COURT: Let's put that aside for a moment, because I don't intend to call the jurors in her en masse and say: Are you all still impartial? I have my reasons for that. And if I handle that issue, I would handle it differently.

MR. MOMOT: No. To ask, Judge, whether or not that juror had spoken to these other jurors.

THE COURT: Exactly. But that's a situation that rings bells that I'm not prepared to ring just yet until I've decided exactly how I want to phrase it. So for the time being I'd say we can go forward with them, but with (p. 37) her, I –

MR. MOMOT: I'd like to have her off the jury.

THE COURT: Okay. There's a challenge for cause to that juror.

Mr. Basl.

MR. BASL: Judge, I think that you have already admonished her. She has given you her answers. I think it's premature at this point to simply excuse her. It may be something that you want to look into as we approach the end of the trial in terms of making the final decision, but there is only one alternate in this case, and I think that under the circumstances she has at least come forward very honestly.

She wasn't asked directly exactly, "What did you say that would cause this?" And as a matter of fact, you tried not to get her to go into those specific things because, you know, it's a touchy situation. But she has been admonished again, and she has indicated that she can remain fair and impartial.

Everybody as a natural human consequence starts to think about certain things. The law says that you don't make up your mind and make any final decisions until you are in a position to do so. And I think that is exactly what she was trying to express to the Court, is that you can't (p. 38) not think about these things as they are ongoing. But she hasn't made up her mind; she is not

unfair or biased at this point. And we simply have a particular circumstance which, quite frankly, I don't think is unusual.

I mean, I'm sure that many jurors spend a lot of time talking about attorneys and whether they stand straight and how they sit and how they talk and everything else before they ever get to the merits of a case. But I don't know that that would otherwise require them being excused for cause, or we might never be able to have a jury.

MR. MOMOT: Two things. One thing that was important by the bailiff mentioning is that we were beating a dead horse. In other words, she already formulated an opinion as to guilt or innocence in this case. And I don't know why, but I have the feeling that it's not favorable to the defense. That's number one. I had a vision over the lunch hour, your Honor, on that.

Number two, this woman can't even be candid with the Court. I can't trust her. I wouldn't trust her if she told me it was daylight outside. Based upon what she said to you, your Honor, she can't even tell the Court what she said to your own bailiff which was asked by the Court, or by myself. I forget which. But she can't be candid.

That's all. You talk about a problem with an (p. 39) alternate. It was the State that said to the Court, "Judge, I only think we need one alternate in this case." So now I'm a little hard-pressed to have any sympathy for the State after they suggest to the Court we only need one alternate, then raise that as argument that we have to keep all the jurors because we only have one alternate.

I think it's ludicrous to think that this juror should sit throughout the whole trial, and then for the Court to make a ruling at the end of it. I don't think that serves any purpose.

THE COURT: All right. I had some thoughts about Mrs. Caldwell that I would like to mull over, and I'll make a decision by the end of the day. There's no harm done in having her sit, as well as the alternate, for a couple more hours while I make a determination on cause.

My concern with Mrs. Caldwell, even before she said anything to the bailiff, was the appearance that she gave of not paying attention. Once she explained that to me, I feel like I would like to observe her a little while longer, decide whether or not either our conversations had effect or whether or not she's changed her in-court demeanor a little bit. But I will inform you, and her, of course, by the end of the day, if I decide to excuse her.

Do you want to bring them back in, please.

* * *

May 21, 1987

(p. 68) And my comment about Mrs. Caldwell is I felt that she could remain on the jury for a period of time, after which I would inquire as to her state of mind again to see (p. 69) if maybe we might have put her in a situation to be more impartial.

TRANSCRIPT OF PROCEEDINGS

Volume III

May 20, 1987

* * *

(p. 279) (The jurors were excused for the non recess.)

THE COURT: The record will show that all the jurors have been excused except for juror number five, Mrs. Caldwell.

Mrs. Caldwell, the bailiff informed me during the last break that apparently you were having difficulty keeping an open mind. I think it's encumbant upon me at this point to allow both myself and the attorneys to explore that and see where the problem is.

Would you like to – Let me tell you this, Counsel: The concern that apparently was relayed to the bailiff was some animosity about objections and interruptions.

Mr. Momot, maybe I will inform you that those (p. 280) were somewhat directed towards yourself.

Would you like to ask any questions of the juror?

MR. MOMOT: What's the problem?

MR. BASL: Judge before we do that – I mean, while I am just as curious as I'm sure everybody is, I'm concerned that maybe this is the type of situation that would be appropriate for Your Honor's simple admonishment to the juror about her oath, about the fact that you have already instructed that certain objections can be made and it's up to the Court to rule on them, and the fact that she is required to keep an open mind throughout the

course of this and cannot come up with any preconceived idea one way or the other, and whether an admonishment itself could be made, and then ask her whether that would sufficient to clarify this, as to opposed to going into necessarily facts and circumstances that might otherwise cause an even potentially greater problem.

That's just my concern that I expressed to the Court as maybe being a procedure we could follow.

THE COURT: Okay. I guess in trying to expedite things – I did have some concern, myself, Mrs. Caldwell, I think you're already aware you weren't paying attention and I asked the bailiff to please ask you, and again I have reminded all jurors that they should not only listen to but watch all of what occurs in the courtroom.

(p. 281) He then came back to me and said that you were just doing that because you didn't want to make it uncomfortable for you yourself or the witness to be staring at them all the time.

I, frankly, had some concerns about whether or not you had been paying full attention. I would ask you now, first of all, let me remind you that at the outset I told you it was the attorney's privilege to object to admission of evidence or any asking of questions which would call for inadmissible evidence. And I also informed you that interruptions are just sort of a way of life around here and we do apologize for them.

Can you, in light of what's occurred thus far in those two categories, continue to keep an open mind and listen to all the evidence and fairly give each side a trial?

JUROR CALDWELL: Yes, sir – ma'am, Your Honor, I am trying very hard to do that. I just thought it was only fair to let the bailiff know that it was becoming extremely hard to keep total open-minded. I know there's cross-examination, I understand the judicial procedure, and I am paying attention. Even though I'm not staring right at people, I'm hearing everything that's being said and done.

I just felt within myself I might be building up some kind of an attitude about the situation and I didn't want (p. 282) to, I don't want to, I want to be extremely fair to all parties involved. I just thought – it was the continuing interruption is not what I normally thought a procedure went.

If this is the normal type procedure, then this is something for me to learn and understand and assimilate into the general information. I'm not aware of normal court procedures.

I just thought it was only right to tell the bailiff exactly what I was beginning to feel, and I'm very definitely trying to keep a total open mind on the whole situation.

THE COURT: Well, I have a hard time – it's hard for me to single somebody out because I know that you're probably not all that comfortable in the courtroom facing all of us and giving these answers, but I am very concerned because the interruptions – the interruptions so far, as I told you at the beginning, I don't take interruptions or recesses for no good reason.

Number one, we start late quite often because I have a morning and afternoon calendar, but usually it is completed within a half an hour, but occasionally goes overtime; number two, there have been legitimate interruptions and recesses for legal matters.

But my problem is that I explained that at the (p. 283) beginning, I thought, and what is quite normal is something that I tried to describe as being almost an undefinable concept. Normal is just what it is. I assure you that.

But if it can't be – and, furthermore, and more importantly, any interruptions or confusion or delays should not be blamed on anybody, and if you're starting to place the blame on somebody for that, that we should know about.

Have you done that?

JUROR CALDWELL: No, not directly. Just seemed to come about that way, but it's not any particular blame on any one person, no.

MR. MOMOT: May I make an inquiry, Judge?

THE COURT: I think you both should. I think we're at that point. Mr. Basl, would you like to ask some questions first? Just going in the order where we usually do in voir dire.

MR. BASL: Mrs. Caldwell, could you give us your assurance that you will keep an open mind about this –

JUROR CALDWELL: Yes, sir.

MR. BASL: – and not make any decisions until the case has been given to you by the Judge?

JUROR CALDWELL: I am trying very hard to do that.

MR. BASL: There may be some inconveniences, and (p. 284) it is just as inconvenient, I suppose, for the Court and both counsel as it is for jurors sometimes when these things happen, but all I'm asking is can you keep an open mind, can you give that assurance?

JUROR CALDWELL: Yes, sir. I'm trying very hard to.

THE COURT: Mr. Momot?

MR. MOMOT: Ma'am, you indicate you are saying that you are trying hard to keep an open mind, therefore in the natural progression of logic, you don't have an open mind at this time.

JUROR CALDWELL: At this point in time, do I have an open mind about the outcome of the trial or the procedures?

MR. MOMOT: Both.

JUROR CALDWELL: Well, yes, I have an open mind. I realize everybody has their rights and their rights should be heard pro and con.

MR. MOMOT: Well, apparently, I get the indication that you're upset with my objecting or asking for a hearing outside the presence of the jury, or that doesn't really square with you; is that correct?

JUROR CALDWELL: I wasn't familiar with it happening as repetitiously as it happened, yes, I guess that's probably bothered me.

(p. 285) Mr. MOMOT: And that causes you an annoyance.

JUROR CALDWELL: Not so much an annoyance, not like it's an annoyance. It causes me concern that I'm letting it influence possibly my thinking, and I realize I should not do this.

MR. MOMOT: And it is influencing your thinking.

JUROR CALDWELL: I thought it was fair to let the bailiff know that it was possibly influencing my thoughts, yes, sir.

MR. MOMOT: I agree with that, that's a good thing to do, to let the bailiff know. But it is influencing your thinking by operation my objecting; is that correct?

JUROR CALDWELL: No, no, not just your objecting, per se. You have a right to. If you were my lawyer I would want you to do everything within your power to do whatever it is you have to do as a lawyer. No, I don't – it's not the procedure like that.

It's just – I just did not know what norm is. I know what you told us in the beginning and I understood it. I just felt myself being colored a little in my thoughts. I thought it was only proper to say so, and I'm trying, as I told the bailiff, very hard to keep a totally open mind on the situation.

MR. MOMOT: When you say colored, what do you (p. 286) mean by colored in your thoughts?

JUROR CALDWELL: Just exactly that, I mean my thoughts are being infiltrated with ideas that shouldn't be

there. Being an honest person, I'm trying to keep them at bay.

MR. MOMOT: Your thoughts are being infiltrated with what?

JUROR CALDWELL: Just what I said earlier, the constant delays, the constant – everybody being out of the room and not knowing what we're supposed to be doing.

MR. MOMOT: Has that caused you, because you're ushered out of the courtroom, you feel you're objectionable that something is being kept from you?

JUROR CALDWELL: No, oh, no. I realize there's things that you have to resolve that we're not to be aware of. That's why we're ushered out of the room.

MR. MOMOT: You don't like the procedure.

JUROR CALDWELL: It isn't a question of like or dislike, it was just a question I was afraid I was becoming a little bit tainted in my thoughts and I thought I better say something in all honesty.

THE COURT: Where would the taint go? I mean, if it's me, I don't mind.

JUROR CALDWELL: Oh, no –

(p. 287) THE COURT: If you don't like – and I don't want you to say that – but if it's directed for or against a party, then we should know about it. If you're just discouraged with me because of the management of the calendar, then that's fine.

JUROR CALDWELL: No, no. No, that's not it at all.

THE COURT: Then is it directed towards somebody? Is somebody now at a slight disadvantage as a result of your thoughts being colored?

JUROR CALDWELL: As in the defendant, you mean?

THE COURT: Well, I don't want to put words in your mouth. If you say you're tainted, then I have to know where the taint is going to reek its effect.

If you're tainted to the point where you never want to be a juror again, well, okay. But if you're tainted to the point where this trial is going to be affected somehow, then that's what we should know.

JUROR CALDWELL: Well, at this point in time if that's what it is, then that's the honest truth. I definitely have – I have an opinion, and I know that I'm not at this point supposed to have an opinion.

Now, whether my opinion would be swayed in time by the situations as presented to themselves, I pride myself (p. 288) on being very fair and impartial. I just found myself not being as fair and impartial as I thought I should be, and I thought it was my duty to say something. I didn't know that would be not the thing to do.

THE COURT: No. You're absolutely right to say something. If the trial continued along generally as it has been, where do you think you opinions are going to go, going to get reinforced, going to get put aside?

JUROR CALDWELL: It just depends on the evidence presented, ma'am.

THE COURT: Does anybody have any further questions?

MR. MOMOT: Well, I think –

THE COURT: Before you make any motions, do you have any questions?

MR. BASL: No, Your Honor. I think an admonishment from you would be sufficient.

THE COURT: Okay, Mrs. Caldwell, I apologize for the discomfort you might feel as a result of having been brought in here, but this is the way we do things and this is the way I believe it needs to be resolved.

You were absolutely correct to have said something, and I congratulate you for that.

As to whether or not it has any ramifications (p. 289) from here on in, I'd like to think about it and let you know if any action will be taken.

In the meantime, you may assume that you are still a juror, and I will ask you again not to form or express any opinions about the outcome of this case, not to draw any adverse conclusion with reference to any party in this action by any of the procedural matters that are part if this case, that being objections, legal arguments, requests for a hearing outside the jury's presence, the length of those hearings and the fact that perhaps this case hasn't been moving according to what you thought it might be.

As I recall, you were in a jury trial that took approximately ten hours to try once, and that, I would tell you, is probably not normal. Short trials like that just usually don't happen.

In your case it happened that the facts and the particular charges lent themselves to a short trial. This one does not.

And so in that regard I would continue to admonish you, and do you believe you could follow the Court's admonishments until further notice, it there is any notice?

JUROR CALDWELL: Yes, sir.

THE COURT: Thank you, you are excused for lunch, and again, I appreciate you answers. See you at 2:00.

(p. 290) (Juror Caldwell was excused for the non recess.)

THE COURT: All right. Whether or not anybody believes that that was warranted or necessary, I do believe that what I heard was enough to indicate to me that an opinion has been formed.

I'd like the bailiff to be sworn in now and have him tell exactly what Mrs. Caldwell told him, since I don't want to be the purveyor of the news.

(The bailiff was sworn.)

THE COURT: Matt, please tell us what Mrs. Caldwell told you, without coloring it or anything like that, and we'll know then where we stand.

THE BAILIFF: She pulled me aside outside in the hallway and said that the constant objections were causing her to feel an animosity towards Mr. Momot, and she felt that Mr. Momot – it's kind of hard to understand – she said it was like a fish flopping on a deck beating a dead horse.

THE COURT: Okay. Thank you.

MR. MOMOT: Hope the other jurors don't feel that way, Your Honor.

THE COURT: All right. Just for the sake of time and for the sake of all of us being able to digest what has just occurred, if you do ask for a challenge or ask for any measures to be taken beyond what the Court's done, will you (p. 291) save them until shortly before we move into trial this afternoon? I just prefer not to use the time now, okay? Then you can talk it over with your client.

* * *

Supreme Court, U.S.
FILED
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No. 89-252

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1989

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BARRY WARREN CLYDE,

, Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

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# RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## TABLE OF CONTENTS TO PETITION


Page

STATEMENT OF THE CASE.....1

ARGUMENT.....15

The Statute Is Not Void For Vagueness.....16

The Statute Does Not Violate Defendant's Fifth or Sixth Amendment Rights.....18

Juror Bias Did Not Occur.....22

CONCLUSION.....25

## INDEX TO AUTHORITIES CITED

### Cases


Page

**Connally v. General Construction Company,**
296 U.S. 385 (1926).....16

**Erwin v. Dowd,**
36 U.S. 17, 81 S.Ct. 1639, 6th L.Ed.2d 751 (1961).....24

**Grayned v. City of Rockford,**
408 U.S. 104 (1972).....17

**Kaplan v. State,**
96 Nev. 798, 618 P.2d 354 (1980).....24

**Murphy v. Florida,**
421 U.S. 794 (1975).....24

**Papachristou v. City of Jacksonville,**
405 U.S. 156 (1972).....17

**Roberts v. United States,**
445 U.S. 552, 63 L.Ed.2d 622, 100 S.Ct. 1358 (1980).....20

**Sanchez v. State,**
103 Nev. 166, 734 P.2d 726 (1987).....20

**Sheriff v. Lugman,**
101 Nev. 149, 697 P.2d 107 (1985).....16

**Smith v. Goguen,**
415 U.S. 566 (1973).....17

**State v. Benitez,**
395 So.2d 514 (S.Ct. Florida 1981)....21

## Index To Authorities Cited


Page

**State v. LaCompte,**
406 So.2d 1300 (S.Ct.La. 1980).....22

**State v. Willis,**
300 S.E.2d 420 (N.C.App. 1983).....22

**Wheatt v. State,**
410 So.2d 479 (Ala.Cr.App. 1982).....22


### Nevada Revised Statutes


NRS 453.3405.....15, 19

NRS 453.3405(2).....5

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**RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**

**STATEMENT OF THE CASE**

On November 7, 1986, two confidential informants reported to the Washoe County Consolidated Narcotics Unit about a meeting with Karen Dawson to arrange for the purchase of two kilograms of cocaine. A DEA agent, acting in an undercover role, made contact with Ms. Dawson to complete the two kilogram cocaine transaction for

sixty-six thousand ($66,000) dollars. Ms. Dawson initially indicated that her source of cocaine, Barry Clyde, was expected to deliver the drugs from San Francisco.

Introduced into evidence was a list of phone calls from Ms. Dawson to Barry Clyde (hereinafter "Defendant"). (Record on Appeal: Vol. X, pp. 142, 153; State's Exhibits "A," "B-1" and "B-2").

On November 14, 1986 the undercover agent secured rooms at the Hyatt Hotel/Casino in Incline Village, Nevada for Ms. Dawson. She kept one room. (ROA: Vol. VI, p. 148; Vol. X, pp. 79-80).

Officers of the Consolidated Narcotics Unit (hereinafter referred to as CNU) observed the Defendant to arrive at the Hyatt Hotel carrying a tan case from his car. A trained drug sniffing dog responded positively to the interior of Defendant's car. (ROA: Vol. VII, pp. 190-191; 193-194).

Defendant's conversation with Mr. Paul Kolbus, was overheard by undercover officers who heard Paul Kolbus state that the transaction should go very fast. (ROA: Vol. VII, pp. 252, 253, 287).

Ms. Dawson brought a kilo of cocaine to the undercover officers from her room. Ms. Dawson was placed under arrest and other officers entered her hotel room, where they located and arrested Paul Kolbus, Robert McCollister and Defendant. Another kilogram of cocaine was found in this room, as well as cocaine powder residue and short straw on a table. (ROA: Vol. VI, pp. 147, 151-152, 154; Vol. VII, pp. 154, 159-161; 291-296).

An officer testified that he observed Defendant near the window of the room and that he appeared to have just thrown something out the window. A second officer testified that he observed Defendant at the window throwing out a plastic item

containing a white powder. (ROA: Vol. VII, pp. 240, 244-245, 256, 284-285).

Another officer testified that cocaine residue was found on the floor of the room near the window. The person in the immediate area of the residue on the floor and nearest the window was Defendant. Still another officer testified that he found cocaine residue in plastic bags located directly below the window of the room near Defendant. (ROA: Vol. VII, pp. 256, 259-260).

A search of the room revealed an envelope marked "Clyde and Associates," a kilo of cocaine and a plate with Defendant's fingerprints. (ROA: Vol. IX, pp. 519-582; Vol. VII, pp. 298, 302, 315-319; State's Exhibit "EE").

All four of the individuals were arrested and charged with numerous drug charges including Conspiracy to Sell a Controlled Substance and numerous counts of

Trafficking in a Controlled Substance. Three of the four pled guilty to felony Trafficking.

At arrest, Defendant was given Miranda rights and informed of Nevada's Trafficking statutes; which he signed.

The State's only offer to all four co-defendants would require a guilty plea to Count II, Trafficking in a Controlled Substance. Defendant's counsel was advised that it was a decision between him and his client as to whether or not they would apply for or comply with the substantial assistance provisions of NRS 453.3405(2). (ROA: Vol. III, pp. 284-285).

Co-defendant Karen Dawson provided a statement concerning all four individuals' involvement in the crime. She identified Defendant as the source of the two kilos of cocaine.

Ms. Dawson claimed that she was going to provide substantial assistance; in fact,

she did not. She was sentenced, without benefit of substantial assistance, to 15 years in prison and find $250,000. (ROA: Vol. III, pp. 285).

Co-defendant Kolbus provided a statement to law enforcement officers outlining the involvement of Defendant as the source of the cocaine. (ROA: Vol. III, pp. 397; Vol. II, pp. 544, 554, 560-562, 586, 589-590, 599-600, 616). He provided names and locations for other drug dealers and he made phone calls for law enforcement. Defendant Kolbus pled guilty to trafficking and testified at Defendant's trial. The State argued against a substantial assistance finding for Mr. Kolbus, but the Court found otherwise. Defendant Kolbus was sentenced, with benefit of substantial assistance, to eight years in prison. (ROA: Vol. II, p. 621).

After defense attorney inquiry, it was indicated that the provision of other drug

dealers' names would be the best indication of compliance with the substantial assistance statute at sentencing. Defendant was advised, in the presence of counsel, that he could go to trial and pursue any appropriate choices during the proceedings against him.

On November 24, 1986, after Defendant Kolbus had given his statement to DEA and CNU, Defendant, his counsel, and CNU officers met. Said entire taped pre-conviction discussion was transcribed and attached as an Appendix to the Petition. It was Defendant's position that he could provide major quantities of drugs (100-500 kilos) and major drug dealers, even from foreign countries. (Pet. App. 4, 14). However, it became clear to the experienced CNU officers that Defendant was playing a game. There being no facts offered, there was no way to establish the credibility, honesty or trustworthiness of Defendant.

CNU wanted to confirm Defendant's veracity because, among other reasons, they might have to place their lives on the line based on Defendant's veracity. (Pet. App. 7, 9). Defendant was trying to give the appearance of cooperation while, in fact, giving no information (nothing) whatsoever.

The officers told Defendant:

> "...if you feel if you got a good chance for a shot of beating this case in this Nevada Supreme Court then maybe you ought to take a shot at that..." (Pet. App. 6).
> "...go ahead and take your shot in court on this case, if you're acquitted, and you truly mean what you're saying about helping, then you'll come in and do the right thing." (Pet. App. 11).

Defendant would not commit to providing substantial assistance or information if he were acquitted of his charges. (Pet. App. 12).

Defendant was later told:

> "...If you want to maintain your constitutional principles so far as having a jury and going through the

nine years, have at it; that's you right..." (Pet. App. 13).

"...And once you make the bail and if you want to come back and talk with us and cooperate at that time, that's fine." (Pet. App. 19).

At the end of the meeting, Defendant was again advised to resolve his current case and

"...resolve that first and once that's been resolved, and if you still have that ambition and those feelings, which I don't think you will anyhow, we'll talk about it." (Pet. App. 20).

No information or assistance was provided at the interview, after Defendant was out on bail or after his conviction. Nothing since that time has been provided by Defendant to any law enforcement officer. During the 44 days between Defendant's conviction and sentencing, Defendant neither provided nor offered to provide any information whatsoever. The best that can be said of Defendant is that he offered to work undercover as a drug

purchaser, assuming the officers set up the deal. (Pet. App. 14, 17). It is for that reason alone, the State submits, that Defendant was granted a finding of substantial assistance over the State's objection.

Co-defendant McCollister pled and was sentenced for one felony count of trafficking in a controlled substance.

Defendant's statement to Parole and Probation (pre-sentence) consisted of the following:

> "I attempted to cooperate with law enforcement shortly after my arrest in November of 1986. In a taped interview, I told the police that although I did not know where the two kilos came from that were in the room I was invited to, I had been introduced to a guy in Monterey that I was told was a smuggler. I indicated I would be happy to help law enforcement to set up some deal. I was refused because the officers only wanted to know about this particular deal...." (ROA: Vol. XII).

This statement of Defendant is not true. Defendant mentioned 'California' in

his statement, not 'Monterey.' Nowhere in his statement did Defendant ever tell officers that he did not know where the two (2) kilos of cocaine came from. He would not talk about his case at all.

Co-defendant Dawson made her statement to law enforcement officers, which implicated Defendant. (ROA: Vol. III, p. 785; Vol. VI, pp. 100-113). Co-defendant Kolbus testified that Defendant was involved as the source of the drugs and named him as a co-conspirator, accomplice, accessory and principal. (ROA: Vol. VIII, p. 397; Vol. II, pp. 544, 554, 560-562, 586, 589-590, 599-600, 616, 621).

During the trial, a juror, Mrs. Caldwell, expressed concern, if not displeasure, with regards to the tactics of counsel for Defendant. That is, the juror did not understand that there would be numerous objections, after most were overruled, and hearing interruptions

(outside the presence of the jury). She stated often that she did not understand these aspects of judicial procedure. (ROA: Vol. XI, p. 282). She characterized the problem, in her own testimony, as follows:

> It was the continuing interruption is not what I normally thought a procedure went. If this is the normal type procedure, then this is something for me to learn and understand and assimilate into the general information. I'm not aware of the normal court procedures....I wasn't familiar with it happening as repetitiously as it happened, yes, I guess that's probably bothered me....No, no, not just your objecting, per se. You have a right to. If you were my lawyer I would want you to do everything within your power to do whatever it is you have to do as a lawyer. No, I don't -- it's not the procedure like that. It's just -- I just did not know what the norm is....Just what I said earlier, the constant interruptions the constant -- everybody being out of the room and not knowing what we're supposed to be doing. (ROA: Vol. XI, pp. 282, 284-286).

All statements she made were with regards to the trial procedure, as opposed to any opinion on the case itself. Ms.

Caldwell specifically indicated to the Court that she had been paying full attention, and that she was being open minded. On at least five separate occasions she indicated that she was keeping an open mind. (ROA: Vol. XI, pp. 281-284).

It is accurate that she once indicated that she held an opinion. However, it's clear from the testimony and dialog that this opinion was with regards to the trial procedure and counsel tactics and not an opinion regarding guilt or innocence of Defendant. The Court appropriately admonished her and specifically inquired whether she would follow the admonitions. She clearly answered in the affirmative. (ROA: Vol. XI, p. 289).

When the bailiff was sworn with regards to the statement she made to him by juror Caldwell, he stated that she felt that the constant objections by defense counsel were

causing an animosity towards counsel. She characterized it as "...like a fish flopping on a deck beating a dead horse." (ROA: Vol. XI, p. 290). At no time did the juror ever state that she held an opinion on the guilt or innocence of Defendant - never.

The Court's dialog with her was as follows:

THE COURT: What can you tell us right now about your opinions or lack-of opinions with respect to this case?" (ROA: Vol. VII, p. 355).

MS. CALDWELL: At this point in time I'm just listening to all the evidence and weighing it all. I resolved the problem of the constant going out and going out, because I didn't understand that, but you explained it quite adequately.

THE COURT: Okay. Thank you.

MS. CALDWELL: I'm not having any problems at this time.

THE COURT: Is there any ill feeling or are you attributing anything at all that's going on this case negatively towards any party?

MS. CALDWELL: No.

THE COURT: We have explained to you, then, that although we apologize for the interruptions, that they are to be considered as normal. You have accepted that?

MS. CALDWELL: I have accepted that, yes, your honor. (ROA: Vol. VII, p. 355).

Thereafter, counsel for Defendant asked her no further questions when given the opportunity. (ROA: Vol. VII, p. 356).

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**ARGUMENT**

Petitioner alleges that NRS 453.3405 is impermissibly vague because it contains no explicit standards for controlling its application by law enforcement. The simple

response to this allegation is that this is, in fact, not true. The statute is not applied by law enforcement in any manner whatsoever; it is a sentencing statute for a trial judge, after an evidentiary hearing. The hearing may be requested by either the State or Defendant. It is a post-conviction remedy for sentencing by the Court.

In this very case Defendant's pre-trial interview was tape recorded; said tape was available as evidence for the substantial assistance hearing. The statute gives no authority, power, or authorization to law enforcement in any manner whatsoever.

**The Statute Is Not Void For Vagueness**

The Nevada Supreme Court applied its definition of the Void For Vagueness doctrine from **Sheriff v. Lugman**, 101 Nev. 149, 697 P.2d 107 (1985) (quoting **Connally v. General Construction Company**, 296 U.S.

385 (1926).

> A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process.

Defendants cited authority are distinguishable as cases wherein law enforcement was granted arresting authority based upon their statutory interpretation. In **Papachristou v. City of Jacksonville**, 405 U.S. 156 (1972) a vagrancy statute discretion was given police. In **Grayned v. City of Rockford**, 408 U.S. 104 (1972) the police could arrest for their interpretation of an ordinance prohibiting picketing (anti-noise). Finally, in **Smith v. Goguen**, 415 U.S. 566 (1973), police determired what was contemptuous treatment of the U.S. flag. The Void for Vagueness doctrine is described as one which:

> ...requires legislatures to set

> reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent arbitrary and discriminatory enforcement of criminal statutes. **Smith, supra**, at p. 574.

There was no arbitrary and/or discriminatory police enforcement of a statute in this case.

Inasmuch as men of common intelligence need not guess at the meaning of an evidentiary hearing, nor differ as to its application as both the defendant and the state may bring the hearing and evidence, the statute is not unconstitutionally vague and/or ambiguous.

**The Statute Does Not Violate Defendant's Fifth or Sixth Amendment Rights**

The statute applies in a post-conviction proceeding only, even if the evidence presented is post-arrest or pre-trial. There can exist no violation of the Fifth Amendment privilege against self-incrimination when an adjudication of guilt

and conviction is a condition precedent to an NRS 453.3405 hearing. Equal protection allegations are satisfied as the Defendant, whether convicted by plea or trial, may invoke the statute and bring forth all evidence of his information and assistance and that of any police refusals.

The facts reveal no refusal, by officers, of the statutory benefit to Defendant. A transcript review establishes that Defendant's alleged offer to cooperate was a farce and a sham.

Nothing prevented Defendant from cooperating further after conviction, to earn greater statutory benefits than those given by the Court. The Court's finding of substantial assistance by Defendant negates his allegations.

The Nevada Supreme Court has previously upheld the procedure of informing a defendant of the provisions of the statute against the allegation that the statute

coerces incriminating statements from defendants. **Sanchez v. State**, 103 Nev. 166, 734 P.2d 726 (1987).

This identical statutory procedure was upheld in **Roberts v. United States**, 445 U.S. 552, 63 L.Ed.2d 622, 100 S.Ct. 1358 (1980).

The due process argument is belied by an evidentiary hearing, which Defendant can originate. Evidence will be received of Defendant's actions, activities or proffer of assistance.

It is not unreasonable to assume the existence of factual situations wherein the defendant must provide pre-trial or pre-conviction information in order to gain the statutory benefits due to the secretive, quick, and deadly nature of the drug business. Explaining the statute simply informs one of existing rights and available actions. Their options are then fully known.

Law enforcement's refusal of defendant's offer of assistance or information can be brought out at the evidentiary hearing by witnesses or tapes, etc.

The Florida Supreme Court has addressed an identical statute (from which Nevada took its statute). In **State v. Benitez**, 395 So.2d 514 (S.Ct. Florida 1981), the Florida Supreme Court concluded that the substantial assistance statute does not coerce a defendant into relinquishing the Fifth Amendment privilege by denying him sentencing leniency unless he cooperates with the authorities. The Court stated at pp. 519-520:

> ...We reject this argument, ...nothing in the statute suggests that 'substantial assistance' must incriminate the defendant of crimes other than those for which he has already been convicted (and for which no Fifth Amendment privilege is obviously necessary). ...nonetheless, a defendant need not invoke Subsection (3), as nothing in a

> statute is compulsive. Putting a defendant through a difficult choice is not necessarily forbidden by the Fifth Amendment. See e.g., **Corbitt v. New Jersey**, 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978). ...**Bordenkircher v. Hayes**, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978); **McGuatha v. California**, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971). No constitutional deprivation results if a defendant elects to reap the benefits of Subsection (3).

Other states have held substantial assistance statutes to be constitutional. See **State v. Willis**, 300 S.E.2d 420 (N.C.App. 1983); **Wheatt v. State**, 410 So.2d 479 (Ala.Cr.App. 1982); **State v. LaCompte**, 406 So.2d 1300 (S.Ct.La. 1980).

**Juror Bias Did Not Occur**

Defendant has misconstrued the evidence and statements of the juror. Defendant argues that the juror admits to forming an opinion as to Defendant's guilt. This is not true and no such statements can be found in the evidence.

The juror did form an opinion that had to do with the constant objections of defendant's counsel (trial tactics). The juror indicated often that she was being open minded. She indicated that she would follow the court's admonitions. Therefore, the State submits that defendant's characterization of the juror's opinion applying to guilt or innocence in this case is not factually supported, not appropriate, and not reasonable given the evidence. The juror specifically testified to no ill feeling or anything being attributed negatively towards any party in the matter.

Defendant's argument is refuted by the juror's testimony. It is clear that her comment about 'beating a dead horse' was specifically addressed to the tactics of defense counsel and the trial interruptions. The evidence established, beyond all doubt, that the juror kept an

open mind and was abiding by her oath.

In **Erwin v. Dowd**, 36 U.S. 17, 81 S.Ct. 1639, 6th L.Ed.2d 751 (1961) this Honorable Court stated as follows:

> "The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of impartiality...if a positive and decided opinion has been formed, he would have been incompetent even though it had not been expressed."

In this case, it is obvious that no actual existence of the juror's opinion on the ultimate issue has been proven. What the evidence does establish is an opinion with regards to the procedure, court policy and the method of interruption of trial exhibited by defense counsel.

In **Kaplan v. State**, 96 Nev. 798, 618 P.2d 354 (1980), the Nevada Supreme Court adopted the standard cited in **Murphy v. Florida**, 421 U.S. 794 (1975) regarding juror impartiality. This standard

correctly applied herein, holds that it is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Defendant improperly inputs the juror's language to apply to Defendant's guilt when none was ever so stated, cannot be found in the record, and was not even clarified by Defendant's trial counsel, who had an opportunity to question the juror further and declined to do so.

## CONCLUSION

It is respectfully submitted that Defendant's position that Nevada's substantial assistance statute gives discretionary authority to law enforcement regarding Defendant's assistance is totally contrary to the purpose and language of the statute itself, as the statute is a post-conviction election or option given to Defendant and enforced as a sentencing statute by the trial judge.

The State suggests that all conceivable factual scenarios, as alleged by Defendant, would be addressed at the evidentiary hearing by the trial judge. An appropriate determination would be made thereon, based upon the evidence produced by both parties.

Defendant received the benefit of Nevada's statute, over the objection of the state, and yet offered no information, assistance, or any form of cooperation with law enforcement from the date of his pre-trial interview through the date of his conviction and even to this very filing date. The statute clearly authorized Defendant to cooperate and provide substantial assistance after his conviction and prior to sentencing. Defendant elected not to take benefit of that provision and elected not to provide any information, assistance or cooperation with law enforcement subsequent to his conviction and prior to sentencing. Defendant has

not, to date, provided any information or assistance. Defendant was not truthful to his parole and probation officer regarding his drug information and knowledge.

Finally, the State suggests that the characterization of the juror's opinion as applying to Defendant's guilt is totally contrary to the evidence, the facts, and is contradicted explicitly by the record.

WHEREFORE, it is respectfully submitted that the Petition for Writ of Certiorari should be denied or dismissed.

Respectfully submitted,

MILLS LANE
District Attorney

By Larry G. Sage
LARRY GUY SAGE
Deputy District Attorney

## CERTIFICATE OF MAILING

Pursuant to SCR 28, I certify that I am a member of the Bar of the Supreme Court of the United States. That on this date, I deposited for mailing in the U.S. Mails, with first class postage fully prepaid, a true and correct copy of the foregoing Brief in Opposition, in an envelope addressed to the following:

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198 S. Carson Street
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Further, I state that all parties to be served have been served on this date, by mailing, in the manner described herein.

DATED this 22nd day of September, 1989.

Larry G. Sage

LARRY GUY SAGE
Deputy District Attorney